No. 95-889

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RUTH J. KUHNS on behalf of herself and all others similarly situated,

Petitioner,

vs.

MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

Whether this Court should issue a writ of certiorari to review the Third Circuit's unpublished decision that Petitioner's claims are barred by laches and the applicable statute of limitations where Petitioner waited more than twenty-one years after the transaction at issue to file suit and where the Third Circuit's decision created no conflict among the Circuit courts requiring this Court's review.

II. PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The Petitioner is Ruth J. Kuhns, a plaintiff class representative in the proceedings before the District Court and an appellant/cross-appellee in the proceedings before the Court of Appeals. Respondent is Meridian Bancorp, Inc., the defendant in the proceedings before the District Court and the appellee/cross-appellant in the proceedings before the Court of Appeals. Respondent has no parent companies or non-wholly owned subsidiaries requiring disclosure under Rule 29.6.

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V. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) because this proceeding involves a judgment by the Court of Appeals for the Third Circuit in favor of Respondent.

VI. COUNTERSTATEMENT OF THE CASE

A. Background And Procedural History.

Petitioner challenges a 1970 business decision by Respondent's predecessor to modify its employee benefit program by replacing its profit sharing plan with a defined benefit plan. The Third Circuit held that the statute of limitations and laches bar Petitioner's claims because she waited over twenty-one years after the transaction at issue to file suit.

When the First National Bank of Allentown replaced its profit sharing plan with the defined benefit plan in 1970 enhancing its employees' retirement benefits, all the bank's employees were notified of the changes and all employees, following a prolonged period of silence, appeared satisfied with the changes. But more than twenty-one years after first knowing of the changes, three of the employees, the Plaintiffs in proceedings below, commenced this action in July 1992 to challenge the 1970 transaction, claiming they are entitled to both a defined benefit and the profit sharing benefit it replaced.

The defined benefit plan was established in 1971 to replace (not supplement) the profit sharing plan, which had provided inadequate benefits for the bank's employees. According to its clear language, the defined benefit plan provided a retirement benefit equal to the "greater of" (a) a defined benefit based on the employee's total years of service (including service

before the profit sharing plan existed) and the employee's final average pay before retirement; or (b) a lifetime annuity based on the value of the employee's account balances in the previously existing profit sharing plan plus 4% interest (later increased to 5%).

Despite the defined benefit plan's clear provisions, and the termination of the profit sharing plan, the Plaintiffs claim they are entitled to both the enhanced defined benefit and the profit sharing benefit it replaced. [Petition at 12]. In their complaint, brought as a class action, the Plaintiffs below (hereinafter, the "Employees") purported to raise claims based on the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 ("ERISA") and on Pennsylvania common law.

1. The profit sharing and pension plans.

The Employees claim their individual profit sharing accounts were "embezzled" by the Bank[1] in 1970 when the assets of the now-replaced profit sharing plan were transferred to the newly established defined benefit retirement plan. With good reason, the Third Circuit flatly rejected this allegation finding it "patently

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[1] First National Bank of Allentown merged into Meridian Bancorp, Inc. in 1985. For ease of reference, both Meridian, the defendant below, and First National Bank of Allentown are referred to as the Bank.

false" and "symptomatic of the failings of [the Employees'] lawsuit." [Opinion at 4].

In 1954, the Bank established The First National Bank of Allentown Employees' Profit Sharing Trust (the "Profit Sharing Plan"). The Profit Sharing Plan provided retirement benefits through separate "accounts" for each participant that consisted solely of contributions from the Bank and investment returns on these contributions. Employee contributions were neither permitted nor made.

When the Bank evaluated the Profit Sharing Plan in 1970, serious deficiencies emerged, including the failure to provide lifetime benefits or adequate monthly benefits in many cases. The Bank retained an independent pension consulting firm and assigned two employees, David Hoffman and William Shellhammer (one of the Plaintiffs below), to address the problems with the Profit Sharing Plan.

Shellhammer and Hoffman recommended that the Bank replace the Profit Sharing Plan with a defined benefit plan with past service credit. This plan was adopted effective January 1, 1971 (the "Pension Plan"). Because the Pension Plan increased benefits over the Profit Sharing Plan, the actuarial funding cost for the past service benefits alone exceeded $3.5 million, which was more than the Bank's annual net income, and roughly $1.3 million more than the value of the Profit Sharing Plan assets.

2. Amendment and termination of Profit Sharing Plan

To support their claim for both a Profit Sharing and a Pension benefit, the Employees claim the Profit Sharing Plan was not terminated. [Petition at 18-19]. The Third Circuit rejected this claim because the Employees failed to make a "colorable showing" that proper procedures were not followed. [Opinion at 4 n.3]. In fact, there is no evidence to demonstrate that the Profit Sharing Plan was not terminated.

Pursuant to the plan's provisions, the Bank amended and terminated the Profit Sharing Plan on December 31, 1970 and January 2, 1971 "to convert the existing profit sharing plan into a pension plan." The Bank retained independent pension consultants, attorneys, accountants and tax consultants for advice on completing the transaction. IRS approval was sought and obtained by an application for an IRS determination letter for the Pension Plan, which included a copy of the Pension Plan and disclosed the use of the Profit Sharing Plan assets to fund the Pension Plan and the 4% interest rate. The IRS issued a favorable determination letter, verifying that the Pension Plan satisfied the Internal Revenue Code's requirements for a qualified plan, including the "exclusive benefit" provision of Code §401(a). 26 U.S.C. §401(a).

3. The Employees' accrued benefits were preserved.

The Pension Plan preserved all of the employees' pre-1971 accrued benefits. It did this with its benefit formula that provided benefits equal to the "greater of" (a) a monthly benefit based on "final average pay"; or (b) a monthly benefit based on the participant's "Profit Sharing Account." Under this calculation, the participant's "Profit Sharing Account" (a credit equal to the value of their pre-1971 accrued benefits plus 4% interest to retirement) was converted to a monthly benefit, payable for life, using a standard annuity conversion table. This benefit was then compared to the "final average pay" benefit, and participants were paid the "greater of" the two.

The Pension Plan also paid death benefits equal to the remaining balance of participants' "Profit Sharing Accounts" (pre-1971 accrued benefits plus interest) on behalf of participants who died before receiving retirement benefits equal to their "Profit Sharing Account" balance. Finally, the Pension Plan's termination provisions preserved pre-1971 accrued benefits by requiring an immediate payment equal to the value of the "Profit Sharing Account" balance (before any other distributions) in the event of a plan termination. In short, no participant received less than the value of their pre-1971 accrued benefits.

4. The Employees' knowledge of the transaction in 1970 and 1971.

Every Bank employee was informed fully in 1971 about the transaction involving the Pension Plan and its use of the Profit Sharing Plan's assets. It was announced in an employee news bulletin and explained by Shellhammer and others at employee meetings. It was described in the Bank's 1971 Annual Report and at the annual shareholders' meeting, where Shellhammer was designated to answer questions. A benefit booklet distributed to all employees explained how the Profit Sharing Plan's assets would be used as partial funding for the benefits under the new plan. The employees were also told they would receive only one retirement benefit, not two.

As the Court of Appeals held, each of the Employees had "actual knowledge" of the transaction and their "claims" more than three years before filing suit. 29 U.S.C. 1113(2) (three year statute of limitations for plaintiffs with "actual knowledge" of alleged violation). For example, the Petitioner hired a lawyer, who as early as 1986 raised the very issues on which the lawsuit is based, but waited until 1992 to file suit.

In the more than twenty years from the transaction to the filing of suit, the Bank's pension consultant discarded its records. Plan-related documents, such as notices to employees, the 1971 actuarial report, the consultant's proposal and other documents relevant to the defense, were lost. Most important, two of the three

Profit Sharing Plan trustees died before appellants filed suit, and when the third trustee was deposed, he did not remember being a trustee of the Profit Sharing Plan, much less the specifics of the transaction.

B. Proceedings Before The District Court.

The District Court granted the Bank's motion for summary judgment and dismissed the Employees' state law claims as barred by laches and the ERISA §404 claims as barred by ERISA's statute of limitations. However, the District Court held the Employees' ERISA §403(c) claim regarding the use of the Profit Sharing Plan's assets and an improper interest credit allowing plan assets to inure to the Bank's benefit alleged a "continuing violation" not wholly barred by ERISA's statute of limitations.

Relying on Hickerson v. Velsicol Chemical Corporation, 778 F.2d 365 (7th Cir. 1985), cert. denied, 479 U.S. 815 (1986), the District Court determined the Bank's use of the Profit Sharing Plan assets for the Pension Plan was lawful if the Pension Plan's 4% interest rate was a "reasonable" rate. Following a bench trial to determine the reasonableness of the 4% interest rate, the District Court concluded that 7.4% was a reasonable rate and recalculated the Employees' benefits using the 7.4% rate.

C. The Court Of Appeals' Decision.

On September 8, 1995, the Third Circuit affirmed the District Court on the issues raised in the Employees' appeal but reversed the District Court on the issues raised in the Bank's appeal. First, the Court of Appeals rejected the Employees' claims that the Profit Sharing Plan was not terminated and that the Bank "embezzled" plan assets. [Opinion at 4 and n.3].

The Third Circuit then reversed the District Court's "continuing violation" decision finding the "continuing violation" exception inapplicable to the facts of this case. [Opinion at 6-7]. Because none of the Employees' time-barred claims were preserved by the continuing violation exception, the Third Circuit remanded with directions to the District Court to enter judgment for the Bank on all counts.

Because of the Court's resolution of the statute of limitations issues, its decision did not rest on the Bank's other arguments for dismissal, namely the District Court's failure to apply ERISA's non-retroactivity provisions and failure to apply laches to the Employees' ERISA claims. The Third Circuit, however, concluded that these arguments "appear to have merit and would be alternate grounds for reversal on the cross-appeal." [Opinion at 10 n.6].

VII. REASONS FOR DENYING THE WRIT

There is nothing unique or surprising about the Third Circuit's decision that the Employees' claims are barred by the statute of limitations and laches. This result was compelled by the Employees' failure -- despite their "actual knowledge" -- to file suit until the 1970 transaction was more than two decades old. Nor is there any conflict among the Circuits; instead, the Third Circuit merely applied well-settled legal principles to the unique facts of this case. Far from violating federal law, the Third Circuit's decision is fully consistent with ERISA's statute of limitations and the policies it reflects.

Finally, there is no compelling reason for review because the transaction at issue (conversion of a profit sharing plan to a defined benefit plan) is governed by well-settled legal principles properly applied by the Third Circuit in this case, and is, in any event, an uncommon transaction. Review by this Court is therefore unwarranted as it is unlikely that future controversies over the type of transaction at issue will arise.

A. There Is No Conflict Among The Circuits.

Petitioner's claim of a conflict among the Circuits over the "continuing violation" exception is hollow and should be rejected because (1) the Third Circuit did not reject the continuing violation theory as Petitioner suggests [Petition at 14]; (2) there is no conflict between the Third and Ninth Circuits; and (3) Petitioner's "actual

knowledge" precludes her reliance on the "continuing violation" exception.

1. The Court of Appeals correctly found the "continuing violation" exception inapplicable to this case.

ERISA's express statute of limitations for fiduciary claims is designed to provide repose from the type of stale claims asserted in this case. Larson v. Northrop Corp., 21 F.3d 1164, 1171-72 (D.C. Cir. 1994) (analyzing policies of ERISA §413). When, as in this case, the alleged ERISA violation is a plan amendment or transaction, the statute of limitations runs from the date of the amendment or transaction. E.g., Larson, 21 F. 3d at 1171-72; International Union v. Murata Erie North America, Inc., 980 F.2d 889, 899 (3d Cir. 1992); Ziegler v. Connecticut General Life Ins. Co., 916 F.2d 548 (9th Cir. 1990).

ERISA's statute of limitations on the Employees' claims began to run in 1975 when ERISA became effective and expired long before they filed their complaint. This is why the Employees invoke the "continuing violation" exception to revive their stale claims.

Recognizing that ERISA imposes an ongoing duty on plan fiduciaries to act in certain situations to prevent violations of ERISA, some courts have applied the "continuing violation" exception in cases where a

fiduciary's failure to act constitutes a separate violation of ERISA. For example, in Morrissey v. Curran, 567 F.2d 546 (2d Cir. 1977), a plan fiduciary's persistent failure to sell improper plan investments was a "continuing violation" of the duty to monitor the plan's investments. 29 U.S.C. §1104(a)(1)(C). The fiduciary could therefore be sued for failing to sell the improper investment even though claims relating to the underlying transaction were time-barred.

The "continuing violation" exception, however, does not apply to every alleged breach of fiduciary duty. Instead, the exception requires a series of overt acts, each constituting a separate breach. Phillips v. Alaska Hotel & Restaurant Emp. Pension Fund, 944 F.2d 509, 523 (9th Cir. 1991) (O'Scannlain, J., concurring), cert. denied, 112 S. Ct. 1942 (1992). Moreover, (and critical here) the exception does not apply to a plan amendment or change in formal policy where the injury results merely from implementation of the amendment or policy. In such cases, the cause of action accrues only once -- when the plan amendment or formal policy is adopted.

The distinction between continuing violations and implementation of plan amendments was examined in Russell v. Board of Trustees, 968 F.2d 489 (5th Cir. 1992), cert. denied, 113 S. Ct. 1266 (1993), where the court found the application of a plan amendment on eligibility rules was not a continuing violation. Similarly, in Phillips, the administration of allegedly improper vesting rules was not a continuing violation. 944 F.2d at 523 (O'Scannlain, J., concurring). This

distinction was also recognized in Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1087-88 (7th Cir. 1992), where the court held the continuing violation exception applicable to repetition of informal administrative practices, but inapplicable to the implementation of formal policies.

The Third Circuit properly applied ERISA's statute of limitations, and rejected the "continuing violation" exception, based on the facts of the case. There was no continuing violation or series of overt acts constituting separate fiduciary breaches. Cf. Phillips, 944 F.2d at 523. There was instead the consistent application of a properly enacted plan amendment. The Third Circuit therefore properly rejected Petitioner's invocation of the "continuing violation' exception, and its conclusion is consistent, not in conflict, with the approach taken by other Circuits. Russell, 968 F.2d 489; Martin, 966 F.2d 1078, 1087-88. Petitioner's disagreement with the Third Circuit's application of settled legal principles to the facts of the case does not warrant review by this Court.

2. There is no conflict between the Ninth and Third Circuits over the Meagher decision.

As the Third Circuit concluded, the Ninth Circuit's decision in Meagher v. International Association of Machinists & Aerospace Workers Pension Plan, 856 F.2d 1418 (9th Cir. 1988), cert. denied, 490 U.S. 1039 (1989), is fundamentally distinguishable from

this case. In Meagher, the plan's "living pension" provision required pension increases each time the employer raised salaries for current employees holding the job classifications the retirees held while employed. 856 F.2d at 1419. The employer tried to avoid this obligation by relying on a plan amendment revoking the "living pension" provision even though that amendment had been declared unlawful in prior litigation.

The employees in Meagher sued, claiming the amendment violated ERISA §204(g), 29 U.S.C. §1054(g), which prohibits plan amendments that reduce accrued benefits. The court concluded that each time the employer applied the previously invalidated amendment, it breached ERISA §204(g) again by reducing the employees' accrued benefits in violation of the plan's provisions. 856 F.2d at 1423.

As the Third Circuit held, the Meagher decision is distinguishable from this case because of the nature of the alleged violation. Indeed, it has been distinguished twice in similar circumstances within the Ninth Circuit.

First, the Ninth Circuit explained in Ziegler, 916 F.2d 548, that Meagher is limited to claims under ERISA §204(g), a statute "specifically requiring an actual injury to the plaintiff, a reduction of accrued benefits." 916 F.2d at 551. As recognized by the Ninth Circuit in Ziegler (and the Third Circuit here), the cause of action under ERISA 204(g) accrues only when the harm (a decrease of accrued benefits) is inflicted. Each time the employer in Meagher inflicted such harm, and violated

the plan's terms by relying on the invalid amendment, a new cause of action under §204(g) accrued.

Unlike the plaintiff in Meagher, the Employees never asserted a §204(g) claim either in their complaint or during the proceedings before the District Court. Nor could they because there is no post-ERISA plan amendment at issue in this case, and ERISA §204(g) does not apply to pre-ERISA amendments. 29 U.S.C. §1061. Instead, the Employees alleged claims under ERISA §§403 and 404, 29 U.S.C. §§1103 and 1104, based on the 1970 plan conversion. These claims accrued at the date of the transaction. See e.g., Larson, 21 F.3d at 1171-72; Murata, 980 F.2d at 988-900. Unlike Meagher, there was no series of repeated violations of the plan's provisions.

Second, Judge O'Scannlain distinguished Meagher in his concurring opinion in Phillips. Unlike the employer's successive and overt violations of ERISA §204(g) in Meagher, the continuing violation exception did not apply to the Phillips plaintiffs' claims that the employer's implementation and operation of restrictive vesting rules violated ERISA. 944 F.2d at 523. Thus, Judge O'Scannlain concluded, like the courts in Russell and Martin, that the continuing violation exception does not apply to the application of a plan amendment or formal policy.

This case simply involves the consistent administration of the Pension Plan in accordance with its provisions. There is no series of separate and overt

violations of the plan's provisions as in Meagher. The Third Circuit therefore created no conflict among the Circuits by properly distinguishing Meagher, and the writ should be denied.

3. Petitioner's "actual knowledge" precludes application of the "continuing violation" exception.

The federal courts agree that the "continuing violation" exception cannot be invoked by a claimant who had "actual knowledge" of an alleged violation. Phillips, 944 F.2d at 520-23; Starr v. JCI Data Processing, Inc., 757 F. Supp. 390, 395 (D. N.J. 1991). This is because ERISA §413, 29 U.S.C. §1113, "requires application of the earlier of either six years from the breach or three years from actual knowledge of the breach" as a statute of limitations. 757 F. Supp. at 345 (emphasis in original). Indeed, the Ninth Circuit would not extend its holding in Meagher to this case because the Employees each had actual knowledge of the alleged violation more than three years before filing suit. Phillips, 944 F.2d at 521. For this reason as well, the writ should be denied.

B. There Is No Violation of Federal Law Requiring Review By This Court.

Petitioner incorrectly claims the Third Circuit's decision violates federal law by undermining ERISA's "anti-inurement" provision, interfering with the Employees' rights to "vested" benefits and preventing the

Employees from pursuing their claims under "tax law." Contrary to Petitioner's claims, the Third Circuit's statute of limitations ruling comports fully with federal law.

The applicable federal law is found in ERISA §413, 29 U.S.C. §1113, which sets forth ERISA's statute of limitations for breaches of fiduciary duty. This statute reflects "a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy." Larson, 21 F.3d at 1172 (analyzing ERISA's statute of limitations). Accordingly, federal law is well served by the Third Circuit's decision that the statute of limitations bars the Employees' twenty-one year old claims.

Petitioner's attempt to circumvent ERISA's statute of limitations by resorting to federal common law fails for two reasons. First, federal common law is inapplicable because ERISA already provides remedies for the wrongs the Employees allege. E.g., Tassinare v. American Nat'l. Ins. Co., 32 F.3d 220 (6th Cir. 1994); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 n. 8 (3d Cir. 1990). Because ERISA expressly provides remedies for the alleged "taking" of plan assets under its anti-inurement, exclusive benefit and fiduciary violation provisions, 29 U.S.C. §§1103(c), 1104(a)(1) and 1109, creation of a federal common law cause of action would improperly expand the "exclusive" remedies Congress provided in ERISA. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987); Hozier, 908 F.2d at 1162 n.8.

Second, the authority to develop federal common law for ERISA "is not the authority to revise the text of the statute," Mertens v. Hewitt Associates, 113 S. Ct. 2063, 2070 (1993), or contradict its language and policies. Singer v. Black & Decker Corp., 964 F.2d 1449, 1453 (4th Cir. 1992). Yet the federal common law remedy the Employees propose (a cause of action not subject to ERISA's statute of limitations) contradicts ERISA §413 and its underlying policies. Allowing fiduciary claims to be recast as federal common law claims to avoid the statute of limitations would frustrate the policy of repose reflected in ERISA §413. Larson, 21 F.3d at 1172. In short, federal common law cannot be used because the Employees' "lack of a remedy does not result from some awkward gap in the statutory scheme, but instead results from [the Employees'] delay in seeking relief." Tassinare, 32 F.3d at 225.

Moreover, none of Petitioner's proposed federal remedies provides any basis to avoid application of ERISA's statute of limitations. For example, the Employees cannot avoid the statute by alleging an anti-inurement claim under ERISA §403(c), 29 U.S.C. §1103(c), because the statute expressly applies to actions commenced under ERISA's fiduciary provisions, including §403(c). 29 U.S.C. §1113 ("No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty or obligation under this part . . . ."). ERISA's statute of limitations has therefore been applied to similar claims involving alleged inurement of plan assets to an employer's benefit. Cf. Gluck v. Unisys Corp., 960 F.2d 1168, 1179 (3d Cir.

1992) ("if the 1984 amendment did wrongfully channel funds from the plan to the company, then, absent fraud or concealment, the six year limitations period would have begun to run at the time the 1984 amendment was adopted.").

Similarly, Petitioner's claims for "vested" benefits do not negate the statute of limitations. Indeed, even in routine denial of benefit claims, courts have long applied ERISA's statute of limitations (or "borrowed" a state law statute of limitations for non-fiduciary claims) even though such claims often involve allegedly vested benefits. E.g., Gluck, 960 F.2d at 1179.

Finally, Petitioner's alleged "tax law" claims provide no basis for ignoring ERISA's statute of limitations. Here Petitioner pursues "claims" under the "exclusive benefit" provision in 26 U.S.C. §401(a), an interpretive regulation and a revenue ruling. [Petition at 22]. The Employees, however, have no private cause of action under the Code's "exclusive benefit" provision. Reklau v. Merchants National Corp., 808 F.2d 628, 631 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987) (IRC §401 creates no substantive rights that can be enforced by plan participants); Cf. Trenton v. Scott Paper Co., 832 F.2d 806, 810 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1985) (no private cause of action under IRC §416(g)).

Nor are there any grounds for using the "tax law" to frustrate Congress' intent of barring untimely fiduciary claims. The framework of civil enforcement under

ERISA would be frustrated if, for example, plan participants could avoid the express statute of limitations on ERISA's "exclusive benefit" provision, 29 U.S.C. §1104(a), by filing a private cause of action under the Internal Revenue Code's "exclusive benefit" provision, 26 U.S.C. §401(a).

Whether styled as a continuing violation or federal common law argument, the underlying problem with the Employees' position is the same: their position conflicts directly with ERISA's express statute of limitations and the policies it reflects. The Employees' position would effectively repeal the statute of limitations in many pension cases, particularly cases involving defined benefit plans, where creative participants can allege improper "inurement" from every plan amendment or decision that affects benefits and, theoretically, reduces an employer's funding costs. Cf. Malia v. General Elec. Co., 23 F.3d 828, 830-31 n. 2 (3d Cir.), cert. denied, 115 S. Ct. 377 (1994) (examining funding principles in defined benefit plans). This would lead to absurd and unintended results, with plan participants (like the Employees) waiting decades to challenge plan transactions.

The Third Circuit properly rejected the Employees' ill-conceived statute of limitations arguments and its decision does not require review by this Court.

C. The Facts Of This Case Present No Compelling Reason For Issuance Of The Writ.

There are two reasons why this case does not involve the type of important substantive issues requiring review by this Court.

First, the Employees' basic contentions are readily refuted by well-settled legal principles and the factual record developed before the District Court. The Employees' claim that the Profit Sharing Plan could not be converted into the Pension Plan because of their vested interests in their profit sharing accounts fails because the Employees had vested rights to accrued benefits, not an ownership interest in the underlying trust. Hickerson, 778 F.2d at 372-74.

So long as the Employees' accrued benefits were not reduced -- which they were not under the Pension Plan's "greater of" benefit formula -- the transaction satisfied both common law and ERISA. Malia, 23 F.3d at 831 (analyzing ERISA §208's protections for accrued benefits in plan mergers and combinations); Genevese v. Martin Marietta Corp., 312 F. Supp. 1186, 1189 (E.D. Pa. 1969) (employer could use employee contributions to fund new plan under common law exclusive benefit rule); Garner v. Girard Trust Bank, 442 Pa. 166, 170-71, 275 A.2d 359, 361-62 (1971) (plan could require forfeiture of vested benefits as penalty for employee competing with employer). Nor was the Bank's business decision to convert to a new employee benefit program

constrained by fiduciary duties under common law or ERISA. Blaw Knox Retirement Plan v. White Consol. Indus., 998 F.2d 1185, 1189-90 (3d Cir. 1993) (ERISA's business judgment rule); Sutter v. BASF Corp., 964 F.2d 556, 562 (6th Cir. 1992) (addressing pre-ERISA plan mergers).

Second, the type of transaction at issue (conversion of a profit sharing plan to a defined benefit plan) is uncommon and unlikely to reoccur with any frequency. Indeed, since ERISA was enacted, there have been only two cases involving this type of transaction (Hickerson and the present case). Moreover, because of the costs involved in administering defined benefit plans, including costs for actuarial services and PBGC insurance, the trend in recent years has been for employers to move away from defined benefit plans to defined contribution plans. Thus, a decision by the Court on the merits of this case is unlikely to have any significant impact on parties other than those involved in this case.

Finally, the Employees' claim that they are entitled to both a profit sharing and a pension benefit because the Profit Sharing Plan was not terminated is not supported by the record. As the Court of Appeals noted, the Employees failed to make a "colorable showing" that the Profit Sharing Plan was not terminated. [Opinion at 4 n. 3].

This case presents no unsettled or controversial legal issues and the resolution of the Employees' claims

will have little, if any, impact on the public at large. There therefore is no compelling reason for the Court to review this case and the writ should be denied.

VIII. CONCLUSION

This case involves no conflict among the Circuits, no violation of federal law, and reaches no important federal issues requiring review by this Court. Instead, this case involves the Third Circuit's reasoned application of well settled legal principles and dismissal of claims that were over two decades old when filed. Petitioner's disagreement with the Third Circuit's application of settled legal principles to the facts of this case does not merit review by this Court. For these reasons, Respondent respectfully requests the Court to deny the petition for writ of certiorari.

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